

Editor's note: Reconsideration denied by order dated June 26, 1974

UNITED STATES
v.
COLONNA AND COMPANY OF COLORADO, INC.

IBLA 73-289

Decided January 24, 1974

Appeal from a decision dated January 24, 1973, by Administrative Law Judge Robert W. Mesch, holding the Red Cedar Nos. 1 through 4 and the Colorado Red Nos. 1 through 4 placer mining claims null and void (Colorado Contest 488).

Affirmed.

Applications and Entries: Generally--Mining Claims: Contests--Mining Claims:
Discovery: Generally--Mining Claims: Patent

Where, in a direct proceeding against a mining claim, the Department finds no discovery has been made and declares the claim invalid, an application for mining patent based on the invalid mining claim must be rejected.

Mining Claims: Determination of Validity--Mining Claims: Discovery: Generally

A discovery exists within the meaning of the mining laws when a locatable mineral deposit has been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine.

Mining Claims: Determination of Validity--Mining Claims: Discovery:
Marketability

To establish that a valuable mineral deposit has been discovered within the meaning of the mining laws, it must be shown that

the material within the claims could be extracted, removed and marketed at a profit at the time of location, or prior to July 23, 1955, if the mineral material is a common variety. Moreover, it must be shown that the market for the material has continued without substantial interruption to the present time.

Mining Claims: Determination of Validity--Mining Claims: Discovery: Generally

Where the contestee is seeking to validate a group of claims, he must prove that a valuable mineral deposit exists on each individual claim. A showing that all the claims taken as a group satisfy the requirements of discovery is not sufficient.

APPEARANCES: Robert G. Fredrickson, Esq., of Frederickson, Schalon and Johnson, Canon City, Colorado, for the contestee. Lowell L. Madsen, Esq., Office of the Solicitor, United States Department of the Interior, Denver, Colorado, for the contestant.

OPINION BY MR. HENRIQUES

On June 17, 1969, Colonna and Company of Colorado, Inc., filed with the Colorado State Office, Bureau of Land Management, mineral patent applications Colorado 9013, covering the Red Cedar Nos. 1 to 4 placer mining claims situated in sections 20 and 21, T. 16 S., R. 70 W.; and Colorado 9014, covering the Colorado Red Nos. 1 to 4 placer mining claims situated in sections 11 and 12, T. 18 S., R. 71 W., 6th P.M., Fremont County, Colorado. Thereafter, on May 27, 1971, the State Office filed a complaint challenging the validity of the eight placer mining claims named in the patent applications, charging, inter alia, that no discovery of a valuable mineral deposit was shown on any of the claims. Colonna timely answered the complaint, denying the charges. The issues being joined, the matter came on for a hearing, which was held April 25, 1972, in Canon City, Colorado, before Administrative Law Judge Robert W. Mesch.

The Judge heard testimony and received evidence on the following charges:

- a. No valuable mineral deposit has been discovered within the limits of any of the claims.

- b. The lands within the limits of the claims are nonmineral in character.
- c. The claims were located in 1960 and 1966 for common varieties of stone, which have not been locatable under the mining laws since July 23, 1955, the date of Public Law 84-167 (69 Stat. 367; 30 U.S.C. § 601 et seq.).
- d. The claims are not valid because the surface boundaries of each claim were not marked with substantial posts, sunk into the ground, one at each angle of the claim, as required by Colorado Revised Statutes, 1963, Sec. 92-22-12(c).
- e. The Granite Placer mining claim, upon which the contestee bases its possessory rights in and to the lands covered by the Colorado Red Nos. 1 through 3 placer mining claims, is invalid because it was located pursuant to a scheme or device designed to circumvent the mining laws of the United States.

The Colorado Red claims are situated about 14 miles north from Canon City, while the Red Cedar claims are situated about 5 miles northwest from Canon City. The claims were located for a red marble or hard limestone in the Manitou formation, a formation widely distributed throughout central Colorado. The quantity of rock present on the claims is enormous. The rock is quarried from the claims, transported to the Colonna plant in Canon City, where it is crushed, sized, bagged and offered for sale for use in making terrazzo.

James McIntosh, a mining engineer employed by BLM, testified as an expert witness that he had examined the Colorado Red and the Red Cedar groups of mining claims, that the rock has a deep red color but is not unique in this respect and, in his opinion, this rock has no special or distinctive value, being used only for terrazzo. He also testified that a prudent man would not expend time or money on these claims with a reasonable expectation of developing a valuable mine. He stated further his opinion that the mineral material present on the claims is a common variety of stone within the ambit of the Act of July 23, 1955. He testified that there is no outcrop of red rock within the Colorado Red Nos. 2 and 3 claims, and that there have never been any workings on these two claims nor on the Red Cedar Nos. 2, 3 and 4 claims. Finally, he stated that the deposits

of red marble on the Colorado Red Nos. 1 and 4, and the Red Cedar No. 1 claims will not independently support a continuing profitable mining operation.

The burden of presenting a preponderance of evidence to show a discovery of a valuable mineral deposit devolved upon the contestee upon presentation of this prima facie case by the Government. Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959).

The contestee's case was presented by testimony and evidence from George E. Smith, president of Colonna. He stated that Colonna provides more than a dozen varieties and colors of rock for terrazzo aggregate, obtaining the rock from a similar number of quarries it maintains in the vicinity of Canon City, Colorado, where it operates a crushing plant and storage yard, and that it could not continue in business if it were restricted to only the contested claims. Colonna provides rock only, and does not participate in the making of terrazzo or in any other use of the rock. Quarries on the contested claims yield a red marble or hard limestone, suitable only for making terrazzo. Significant differences in the shades of red found in the Manitou formation prompted Colonna to locate the separate groups of claims under contest here, the rock from the Red Cedar group being a darker shade of red than rock from the Colorado Red group. The only other domestic source for red marble suitable for terrazzo is alleged to be in the State of Washington. Smith indicated that the groups of four claims each were located, in part at least, to afford a buffer against any competitor operating "next door." Testimony was given that the mineral material extracted from the contested claims has no use other than for terrazzo aggregate and that only after being crushed, as the native rock has too many flaws to permit its removal in large blocks suitable for sawing into slabs. Smith further stated that Colonna has produced rock from the Colorado Red Nos. 1 and 4 claims since 1939, and from the Red Cedar No. 1 claim since 1954. There has been no production from any other of these contested claims. Production of rock has been sporadic, with annual totals ranging from none to less than a total of 800 tons from these claims. The average annual production over the 18-year period from 1954 to 1972 was 260 tons from the Colorado Red group and 50 tons from the Red Cedar group.

Smith asserted that the company made a profit on all its rock because the selling price was derived from a formula which included cost of quarrying and delivering rock to the plant, plus the cost of crushing, screening, bagging, and yard handling. This resultant figure was then increased by one-third for overhead and profit and by an additional 10% for selling commission. No specific cost figures were introduced. The record shows that there has been no

production from the Red Cedar group since 1965 and only a total of 395 tons from the Colorado Red group during the same period. Of this latter amount some 80 tons were being held in reserve at Colonna's plant at the time of the hearing. Smith stated that he, together with his wife Dorothy M. Smith, and his brother James R. Smith, had located the Granite placer mining claim on 60 acres in sec. 21, T. 16 S., R. 70 W., 6th P.M., in October 1939, because he understood that a company could take up only 20 acres; that the benefits from this claim inured solely to Colonna, to whom the Smiths conveyed their interests, if any, in the claim by a quit claim deed dated July 21, 1966, given without consideration. He stated further that the area embraced within the Granite claim is identical to that in Colorado Red Nos. 1, 2 and 3, which were relocations made without Colonna's authority or knowledge by a surveyor employed by the company in 1960, that the name of the relocated claims is the same as that used in marketing the rock therefrom, that Colorado Red No. 4 claim was located in 1966 because the quarrying operations were thought to extend outside of the limits of Colorado Red No. 1 claim, and that there is no record of any location notices for the Red Cedar group of claims until those filed in June 1960, even though the company had removed rock from the land within the claims from 1954.

Following the hearing, Judge Mesch declared all eight placer claims null and void on the ground that "they have not been perfected by the discovery of a valuable mineral deposit within the limits of each of the claims." The Judge stated, that in light of his conclusion relating to lack of discovery, he did not find it necessary to consider any other charge or issue in the amended complaint. He also stated that he assumed for the purpose of his decision that the claims were located prior to the Act of July 23, 1955, 30 U.S.C. § 611 (1970), which provides that "[n]o deposit of common varieties of * * * stone shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located," and that the deposits of stone that might lie within the claims are uncommon varieties of stone and can, if other requirements are met, be deemed valuable mineral deposits within the meaning of the mining laws.

Colonna appeals, asserting that the Judge erred in his interpretation of the evidence, and stating that it assumes the matter is being adjudged under the Act of August 4, 1892 [30 U.S.C. § 161 (1970)]. Appellant adverts to the testimony given at the hearing, again asserting that it has quarried, extracted and removed building stone from the Colorado Red Nos. 1 and 4 placer mining claims since 1934, and from the Red Cedar No. 1 claim since 1954, with the mining operations returning a substantial profit every year that it removed

rock from the claims, so that it considers it has satisfied both the prudent man and the marketability tests cited in the Judge's decision. Appellant argues that the average production figures set out in the Judge's decision are not the proper method to determine whether a valuable mineral deposit is present. Appellant suggests that the years of no production because of market or economic conditions have no relevance to whether or not the building stone is a valuable mineral deposit. Colonna argues that because it has operated at a profit, the presence of a valuable mineral deposit has been established, and further, that because each group of claims is a contiguous entity, the development activities on any claim in the group inure to the benefit of all claims in that group, so that production from only the Red Cedar No. 1 claim should satisfy all legal requirements as to the Red Cedar Nos. 2, 3 and 4 claims, and similarly, operations on the Colorado Red Nos. 1 and 4 claims should benefit the Colorado Red Nos. 2 and 3 claims.

The Judge did not rule on the question of whether the mineral material involved is a common or an uncommon variety of stone within the ambit of the Act of July 23, 1955, 30 U.S.C. § 611 (1970), basing his decision that the claims are invalid on the single issue of nondiscovery of a valuable mineral deposit. Our review of the record does not uncover enough information for us to formulate a decision whether or not the subject rock is common or uncommon. Accordingly, we assume, without deciding, that the red marble rock occurring on the contested claims is not a common variety of stone within the ambit of the Act of July 23, 1955, supra, but is a mineral material locatable under the mining laws.

The basic principles of law applicable to this case are both familiar and venerable and need no extensive elaboration. For a mining claim to be valid there must be discovered within the limits of the claim a valuable mineral deposit. A discovery exists

* * * [W]here minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine * * *. Castle v. Womble, 19 L.D. 455, 457 (1894); United States v. Coleman, 390 U.S. 599 (1968); Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963).

Under the rule of Coleman, supra, the concept of "marketability" as a necessary adjunct to the "prudent man" test becomes an element of discovery. "Marketability," under the cases, means that there must be

a reasonable prospect of a present and continuing profitable mining venture. White v. Udall, 404 F.2d 334 (9th Cir. 1968).

It must be shown, in any event, that there was a discovery of a valuable mineral deposit on each claim at the time of the application for patent. That is, irrespective of the date on which a discovery may have been made, the claims are now invalid if, because of exhaustion of the deposits, a change in economic conditions, cessation of a market for the material, or some other equally cogent factor, the value of the minerals will not justify further expenditures for the development of a mine. United States v. Thomas, 78 I.D. 5, 9 (1971), and cases cited.

Appellant states it assumes this proceeding is under the Act of August 4, 1892, supra, the so-called Building Stone Act. This law provides for mineral entry of lands "chiefly valuable" for building stone. The record does not disclose any testimony or evidence on this point, but in light of our conclusions as to the validity of the contested mining claims, we need not rule on this question. Apart from the question of "chiefly valuable," mining claims located for building stone must satisfy all requirements of the mining laws relating to discovery.

Appellant advocates that its continuing removal of rock from the claims and marketing the rock at an alleged profit since 1954 demonstrates it has satisfied both the prudent man test and the marketability test for discovery. It argues that years of no production or sale of rock from these claims because of economic conditions [lack of market demand] have no relevance to the question of discovery. On this point, the Department has ruled that even if a discovery of a mineral deposit, which was then valuable, has been achieved, such discovery may be lost if present marketability of the mineral material disappears taking away the value of the deposit. United States v. Denison, 76 I.D. 233 (1969); United States v. Gray, 8 IBLA 96 (1972).

In this case the record shows that no rock was taken from the Red Cedar group of claims during the period from January 1, 1966, until the time of hearing in April 1972, and during that same period only a total of 395 tons were taken from the Colorado Red group, with no rock from this group being taken during three of the six years. And of the rock taken, some 80 tons remain unsold and stockpiled at the company's plant.

The argument of appellant that development activities of any claim within a group of mining claims inure to the benefit of all claims in the group is not apposite here. An actual discovery must be shown on each claim. Appellant made no showing that mineral

material exists within limits of the Colorado Red Nos. 2 or 3 claims, nor within the limits of the Red Cedar Nos. 2, 3 or 4 claims, in quality or quantity to satisfy either the prudent man or marketability tests, even assuming that the mineral material is locatable under the mining laws. It is obvious that no discovery of valuable mineral deposits has been made or exists within the limits of any of these claims.

With respect to the three remaining claims, the record shows that although Colonna made sporadic small profits prior to 1966, in recent years there has been little or no production from either of the groups of claims. The contestee argues that we should look to years of actual production and sale to determine whether or not a valuable mineral deposit has been discovered, but this determination must be "based on present economic facts which compare the costs with the expected returns for the product." United States v. Jenkins, 75 I.D. 312, 318 (1968). Even assuming arguendo Colonna had sufficient market for its stone to establish a valid claim at some point in the past, which we do not admit, once-valid claims become invalid if lack of a present discovery of valuable mineral deposits due to changed economic conditions is shown. United States v. Denison, *supra*. See also Mulkern v. Hammitt, 32 F.2d 896 (9th Cir. 1964); United States v. Pumice Sales Corp., A-27578 (1958); Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959). Whether a prudent man could expect to develop a valuable mine is based upon rationally predictable economic circumstances from present known facts and not upon mere speculation of possible substantial, unpredictable changes in the market place. United States v. Denison, *supra*. There has been no production on the Red Cedar claims since 1965. Some stone was extracted from the Colorado Red claims in 1971, but none in 1970 or 1969 and very little in 1968. Even assuming that all of the stone removed from the Colorado Red claims was sold at a profit, this profit would hardly justify a prudent man to invest further time and effort to develop a valuable mine. Thus even those claims which have been mined fail to satisfy the prudent-man and marketability tests. Consequently, no discovery of a valuable mineral deposit has been established as the Administrative Law Judge correctly held.

There remains only the disposition of the mineral patent applications, C 9013 and C 9014, covering the Red Cedar and Colorado Red mining claim groups. As the claims covered by the patent applications have properly been declared to be invalid, the patent applications are hereby rejected. An application for mineral patent will be rejected where it is not shown as a present fact that the land is mineral in character and is valuable for its mineral content. United States v. Logomarcini, 60 I.D. 371 (1949).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Administrative Law Judge is affirmed.

Douglas E. Henriques, Member

We concur:

Joan B. Thompson, Member

Anne Poindexter Lewis, Member

